No. 750

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1957

No. ~~1860~~ MISC.

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA,
SECOND DISTRICT, DIVISION 2
(First Degree Murder)

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PETITION FOR CERTIORARI
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SECOND DISTRICT, DIVISION 2
(First Degree Murder)

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Glenn Martin Harrington prays

that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of California, Second District, Division Two, entered in the above entitled case on November 21, 1967. Petition for a hearing of the above entitled case was made to the Supreme Court of the State of California and a hearing was denied on January 17, 1968. Under the law of California, this petitioner's judgment became final 30 days after January 17, 1968, to wit: February 16, 1968, and he has exhausted all remedies at the State level.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of the State of California, Second District, Division Two, entered in this case on November 21, 1967, is printed in Appendix A hereto; said opinion is entitled:

THE PEOPLE, Plaintiff and Respondent, vs. Jesse Bosby, et al., Defendants and Appellants, 256 Adv. Cal. Appellate Reports 555, rendered by the Honorable Roy Herndon, Justice, and concurred in by the Honorable Lester Wm. Roth, presiding Justice, and the Honorable Macklin Fleming, Justice.

JURISDICTION

The judgment of the Court of Appeals of the State of California was entered on November 21, 1967. A petition for hearing in the

California Supreme Court was denied January 17, 1968. Under California law, the judgment became final February 16, 1968. The jurisdiction of this Honorable Court is invoked under Title 28, U.S.C.A., Section 1257.

QUESTIONS PRESENTED

The principal questions involved herein are the following:

1. Does the joint trial of codefendants in a criminal proceeding before a jury composed of lay citizens where confessions of codefendants implicating this petitioner are introduced in evidence and where said codefendants do not take the witness stand for cross examination purposes violate the confrontation clause of the 6th Amendment and the due process clause of the 14th Amendment to the United States Constitution?

2. Does the process of instructing that lay jury that they are to consider the confessions only as evidence against the confessor and not as evidence against the implicated party sufficiently guarantee due process of law under the 14th Amendment to the party implicated in view of this Honorable Court's ruling in Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774?

3. Is the doctrine of Delli Paoli v. United States (1957), 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 still valid law in view of the combined effect of the decisions of this Honorable

Court in Jackson v. Denno (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774, Turner v. Louisiana (1965), 379 U.S. 466, 13 L.Ed.2d 424, 85 S. Ct. 546, Pointer v. Texas (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065, Douglas v. Alabama (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S. Ct. 1074 and Brookhart v. Janis (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S. Ct. 1245?

4. Does not the combined effects of the above cited cases in question 3, interpreting the 6th and 14th Amendments, require, as a protection of a specific constitutional right, that procedures as set forth by the Supreme Court of the State of California in People v. Aranda, et al. (1965), 63 Cal.2d 518 be now regarded as the law of the land?

5. Because this violation of this specific constitutional right involves the violation of a right protected by the United States Constitution, is not a reviewing Court required to apply a harmless error test at least as strict as that announced in Chapman v. California (1967), 386 U.S. 18, 23, 17 L.Ed.2d 705, 87 S. Ct. 824, viz: "the prosecution must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained?"

6. Does not the denial of a motion to sever the moving party's trial from that of his co-defendant amount to a denial of due process of law whenever said joint trial will require the jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates

both the maker and his codefendant?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

1. 6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an important jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. 14th Amendment

Section 1

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SUMMARY STATEMENT OF THE INSTANT CASE

Petitioner Glenn M. Harrington, along with codefendants Jesse Bosby, George Rhone and Gilbert Cooper, were charged with attempted robbery and first degree murder in the alleged attempt to rob a grocery store and market in Los Angeles.

All were brought to trial jointly in the Superior Court of the State of California for the County of Los Angeles before the Honorable Joseph Wapner.

Petitioner Harrington is a Caucasian, and the other three codefendants are Negroes. Although petitioner Harrington was allegedly identified as being at the scene of the crime, the proprietor of the store testified that she told police that "all four defendants were Negro" and other evidence tended to undermine the identification made of petitioner Harrington as an active participant in the robbery and murder.

In pre-trial incustodial interrogation, extensive confessions were obtained from all three codefendants, implicating Glenn M. Harrington. All three confessions were read before the jury. Two of them consisted of documents over 30 pages in length. Harrington made no confession and plead not guilty. Defendant Rhone did take the stand for cross-examination, but the other two codefendants did not. "Appropriate" limiting instructions to consider each of these extensive confessions only against the confessor were

read to the jury.

It is thus evident that three major, repeated, machine-gun-like, impacting confessions implicating petitioner Harrington were read to the jury; that these three codefendants served as witnesses against Harrington cannot be seriously doubted unless one indulges in the fiction that the lay jury could effectively compartmentalize its mind to give no credence to the repeated implications of Harrington by the other defendants. Harrington was denied the opportunity to cross-examine defendants Cooper and Bosby at all for the reason they chose to invoke their constitutional rights not to be witnesses against themselves.

All four defendants were convicted of first degree murder; said convictions were affirmed by the California State Court of Appeals, 256 A. C. A. 555, despite the court's acknowledgment of the violation of the California "Aranda Rule", People v. Aranda, 63 Cal. 2d 518. The Supreme Court of California denied a Petition for Hearing on January 17, 1968, and its Order became final 30 days later, February 16, 1968.

Petitioner Harrington via his trial counsel made numerous and repeated motions to have his trial severed from the other three codefendants. In a pre-trial motion, said request was denied. After assignment to the trial court, the trial transcript on the following pages indicates the extensive efforts expended by counsel:

Page 3-A, line 10 through page 18-A,

line 3;

Page 11, line 9 through page 20, line 7.

It is to be noted that counsel for Harrington ably and repeatedly cited the United States v. Delli Paoli and Jackson v. Denno decisions as authority for his argument to sever the trials. At all times, the motions were denied by the trial court.

The trial court, acutely aware of the problem, joined in extensive efforts to "edit" each one of the confessions. After numerous attempts, petitioner's counsel complained that, after the extensive editing job to blank out the names of codefendants, the jury would no longer be able to ascertain the extent to which each defendant participated. Because of this, the trial court abandoned effort to delete names and inculpatory phraseology and allowed each lengthy confession to be read in its entirety. In the trial transcript at page 268, line 10 begins the extensive effort of the trial court to edit the confession of defendant Gilbert Cooper. The procedure occupied some 36 pages of effort of the trial court in the transcript.

On page 353 of the trial transcript, the court began supervising the editing job of the confession of George Rhone. Petitioner Harrington's counsel, at page 334, lines 9 and 15, entered timely objections to the deletion process, as it replaced the concrete names with ambiguous phrases such as "this other man"; the name of codefendant Cooper was here changed to "this

other man", and petitioner's attorney felt the jury might speculate that "this other man" might be Harrington. Numerous other objections to the process were entered by respective counsel.

In finality, the trial judge felt that petitioner's counsel was accusing him of making the situation worse for petitioner after the deletions than before, and allowed (see pages 364-377 trial transcript) all incriminating confessions into evidence totally unedited. In this way, with the three Negroes making confessions each implicating each other and petitioner Harrington, there is little doubt that the lay jury had no difficulty in concluding that all three codefendants before the court were involved, and each implicated petitioner by their confession.

Interestingly, the police officer who was to read the edited, greatly altered statements to the jury voiced his own objections to the trial judge (pages 364-369, Trial Transcript). As altered, no names at all appeared, and the officer felt the jury would believe him an incompetent police investigator because he had failed to ascertain the names of the parties involved!

In finality, then, for the purposes of this petition, petitioner Glenn Martin Harrington was tried with three codefendants, all of whom made confessions implicating Harrington. Editing of said confessions was attempted by the trial judge and all counsel, but was abandoned when the result became ridiculous. All three unedited confessions implicating petitioner were read to the twelve men lay jury with "appropriate"

instructions to consider each only against the confessor. Two of the three codefendants failed to take the stand for cross-examination purposes. Petitioner contends each codefendant was a witness who testified against petitioner without confrontation because of the inability of a lay jury to distinguish and compartmentalize the facts in their minds, restricting it only to the confessor.

Upon the authority of Jackson v. Denno (1964), 378 U.S. 368, 12 L.Ed.2d 908, 84 S. Ct. 1774, Pointer v. Texas (1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065, Douglas v. Alabama (1965), 380 U.S. 415, 13 L.Ed.2d 934, 85 S. Ct. 1074 and Brookhart v. Janis (1966), 384 U.S. 1, 16 L.Ed.2d 314, 86 S. Ct. 1245, petitioner contends he has been denied the right to confront all the witnesses testifying against him, and has therefore been denied Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner contends Delli Paoli v. United States has been vitiated and nullified by the above authority, and humbly and respectfully petitions this Honorable Court for a Writ of Certiorari to reconsider this decision of some ten years ago, which has tantamountly been overruled by subsequent authority.

REASONS FOR GRANTING THE WRIT

I

THE LAW OF THE CASE UNITED STATES v. DELLI PAOLI (1957), 352 U.S. 232, IS THEORETICALLY STILL VALID LAW. IN PRACTICALITY, THIS HONORABLE COURT HAS VITIATED SAID CASE BY THE COMBINED EFFECTS OF JACKSON v. DENNO, POINTER v. TEXAS, DOUGLAS v. ALABAMA, AND BROOKHART v. JANIS. BECAUSE OF THIS, IT SHOULD FOLLOW THAT THIS HONORABLE COURT SHOULD GRANT A WRIT OF CERTIORARI TO RECONSIDER THE FULL SIGNIFICANCE OF DELLI PAOLI IN LIGHT OF INTERVENING DECISIONS PROMULGATED DURING THE LAST DECADE.

In 1957, the Supreme Court of the United States in a 5-4 vote decided the case of United States of America v. Orlando Delli Paoli, 352 U.S. 232, 1 L.Ed.2d 278, 77 S.Ct. 294.

As is well familiar to this Honorable Court, the major issue decided permitted the practice of the United States Federal Courts to try two or more codefendants in one trial, and introduce the confessions of any codefendants which

implicated the other defendant or defendants, if proper instructions were read to the jury asserting that said jurors were to consider the confessions only against the maker and in no way dispositive of the merits of the case of the parties codefendant whom might be implicated by the confessor.

As is noted, some excess of ten years have elapsed since the United States v. Delli Paoli decision. Supporting the majority vote were the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices Harold H. Burton, Stanley F. Reed, John Marshall Harlan and Tom C. Clark.

Supporting the dissent were the Honorable Associate Justices Felix Frankfurter, William O. Douglas, Hugo L. Black, and William J. Brennan.

In the interim since 1957, numerous decisions of this Honorable Court have been promulgated which this petitioner respectfully asserts have eroded and nullified the Delli Paoli doctrine. Among these, but certainly not exhaustive are:

1. Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774;

2. Bob Granville Pointer v. State of Texas (1965), 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065;

3. Jesse Elliott Douglas v. State of Alabama (1965), 380 U.S. 415, 13 L. Ed. 2d 934,

85 S. Ct. 1074;

4. James Brookhart v. Martin A. Janis, April 18, 1966, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245.

In addition, several notable decisions of the various Circuit Court of Appeals have interpreted United States v. Delli Paoli in light of Pointer v. Texas and Douglas v. Alabama.

These will be developed within this petition infra.

And finally it is noted that enlightened State Supreme Courts have given considerable attention to this major constitutional issue, some of them promulgating rules of their own to aid in the promotion of fairness in criminal procedures within their own states.

Notable among the latter category is the Supreme Court of the State of California, with its "Aranda Rule", enunciated by Chief Justice Roger J. Traynor, writing for the majority in People of the State of California v. John Mark Aranda, et al (1965), 63 Cal. 2d 518, decided November 12, 1965.

The Supreme Court of California has given retroactive application to the Aranda Doctrine to all cases not having become final on the date of its decision, November 12, 1965, as enunciated in People of the State of California v. John Charles, Jr. and Oliver M. Boddie (1967), 66 Cal. 2d 330.

This petitioner, Glenn Martin Harrington, hereby petitions this Honorable Court to grant him a Writ of Certiorari directed to a review of the constitutionality of the rule of United States v. Delli Paoli in light of the major decisions of Pointer v. Texas, Douglas v. Alabama, and Brookhart v. Janis involving and interpreting the mandates of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner Harrington hereby asserts that the following procedure, now permitted under United States v. Delli Paoli taken alone, violates the Sixth and Fourteenth Amendments to the Constitution of the United States:

Should any court in a criminal matter try in a jury trial two or more defendants in a single trial and introduce into evidence a confession or admission of one of the codefendants which implicates a non-confessing codefendant as a principal or accessory in the crime, without that confessing and implicating codefendant taking the witness stand for the purposes of cross-examination, the non-confessing codefendant which is thereby implicated has been denied the Right of Confrontation of all witnesses who have testified against him; hence he has had the rights guaranteed to him under the Sixth and Fourteenth Amendments to the Constitution of the United States violated; instructions to the jury to disregard the confession as to the implicated party notwithstanding.

Petitioner Harrington asserts that a limiting instruction to a lay jury to consider the

confession only against the confessor, and not in any way dispositive of the case of the defendant who has not confessed, and has thereby been implicated, is inadequate to protect the constitutional rights of the defendant implicated. In the year 1957 in the Delli Paoli case, Assocate Justices Frankfurter, Douglas, Black and Brennan agreed with this assertion.

In 1964 in the case of Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, this Honorable Court agreed with this asserted inability of a lay jury to effectively compartmentalize their minds to evaluate the effects of illegally obtained or involuntary confessions, when, after hearing the confession and voting it involuntary, to thereafter disregard it.

The voting on this issue was 5-4, with the majority being composed of Chief Justice Warren, Associate Justices White, Douglas, Brennan and Goldberg. Four of the majority occupy seats on the current Court.

The Supreme Court of the State of California has declared that it has no faith in said limiting instructions. California Chief Justice Roger J. Traynor speaking in People v. Aranda (1965), 63 Cal. 2d 518, at 526 stated:

> "Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered

harmless to the non-confessing defendant by an instruction that it should not be considered against him."

The California Supreme Court has consistently thereafter adhered to that enunciation. For example, in People v. John Charles, Jr., et al. (1967), 66 Cal.2d 330, 343, through Justice Mathew O. Tobriner, it has stated:

> "The trial court was careful to state in this case that Boddie's confession would not be considered against Charles, but in Aranda (63 Cal.2d 518, 526) we emphatically rejected 'any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the non-confessing defendant by an instruction that it should not be considered against him.' "

It is, in passing, worthy of note that numerous learned United States Supreme Court Justices Circuit Courts of Appeals Justices and United States District Court Trial Judges have colorfully described the inability of a lay juror to totally disregard that which he at one time was to diligently scrutinize for another purpose. Among these are:

1. Honorable John M. Harlan, dissenting in Jackson v. Denno, 378 U.S. 368, 434:

> "But was there not greater danger in Delli Paoli that one defendant's confession of his and his codefendant's guilt

would infect the jury's deliberations bearing on the guilt of the codefendants?"

2. The New York Court of Appeals Justice Lehman dissenting in People v. Fisher, 249 N. Y. 419, 428, 164 N. E. 336, 339:

"... the procedure results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him."

3. Justice Frank of the 2nd Circuit, dissenting in Delli Paoli v. United States, 229 F. 2d 319, 322:

"It is a 'fiction' and a 'naive assumption' about the ways juries can function."

4. In Nash v. United States (2nd Cir.), 54 F. 2d 1006, 1007:

The rule calls upon the jury to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else."

5. The Honorable Felix Frankfurter dissenting in Delli Paoli v. United States, 352 U. S. 232:

"The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such non-admissible

declaration can not be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they can not put out of their minds."

6. Judge Frank in United States v. Antonelli Fireworks Co. (2nd Cir. 1946), 155 F.2d 631, 656:

"... the task was like that of "the boy told to stand in the corner and not think of a white elephant."

It is to be noted as well that the Supreme Court of California in deciding its original Aranda Rule, apparently applied it to a jury trial only. Perhaps then with great soul searching, and with perhaps an admission of inability of its own learned trial judges in the Superior Courts of its 58 Counties to disregard the implicating confession as to the non-confessor, the California Supreme Court again through the majority opinion of the learned Justice Tobriner decided the two cases of People of the State of California v. John Charles, Jr. and Oliver Martin Boddie (1967), 66 Cal.2d 330, and People of the State of California v. Robert Lee

Massie and John Robert Vetter, June 21, 1967, 66 Cal. 2d 899.

In overturning the conviction for first degree murder of John Robert Vetter, Justice Tobriner stated at 916 of 66 Cal. 2d 899:

> "Older cases had held almost unanimously that a court could never abuse its discretion in denying a motion for a separate trial because the jury could be admonished not to consider prejudicial testimony admissible only against a codefendant. The more recent cases, however, recognizing the impossibility of a juror's obliteration from his mind of that which he already knew, have held that the court should separate the trials of codefendants in the face of an incriminating confession, ..."

In People v. Massie and Vetter, the Superior Court of Los Angeles County tried together before Judge H. Burton Noble of Pasadena Robert L. Massie and John R. Vetter, no jury. Robert Massie confessed his crime of robbery and first degree murder of one Mildred Weiss, implicating John Vetter as the driver of the getaway car used in the crime. Robert Massie did not take the stand for cross-examination after his confession was played via tape recorder and testified to by police witnesses from the stand to the Honorable H. Burton Noble, Judge. John Vetter emphatically denied his guilt from the stand. Both were convicted of first degree murder. Subsequently, Robert Massie made

extrajudicial statements exonerating John Vetter as the driver of the get-away car.

On June 21, 1967 the Supreme Court of California reversed Vetter's conviction under the Aranda Rule, People v. Aranda (1965), 63 Cal. 2d 518, per Justice Tobriner, at 66 Cal. 2d 899.

On November 4, 1967, by jury trial, John Vetter was acquitted in Los Angeles County Superior Court of First Degree Murder, in an ordered retrial.

Realistically, the California Supreme Court has recognized that experienced trial judges in its own Superior Courts experience difficulty in disregarding an implicating confession as to its affect on the implicated codefendant.

It is to be noted that dissenting Associate Justices Louis Burke, Stanley Mosk, and Marshall McComb of the California Supreme Court recognized this problem, but kept the faith that the trial level judges could generate the required discernment; at 924 of 66 Cal. 2d 899, People v. Massie and Vetter, Associate Justice Burke states:

"This was a non-jury case tried by an experienced trial judge who presumably (emphasis mine) was able to exclude from his consideration in determining Vetter's guilt evidence admitted solely against Massie (Massie's confession implicating Vetter) and to determine

> Vetter's guilt on the basis of the evidence rather than suspicions arising from Vetter's association with Massie. Although at a separate trial Vetter might have obtained exonerating testimony of Massie (Vetter did; California Governor Ronald Reagan stayed Massie's scheduled execution in San Quentin's gas chamber so he could be a witness at Vetter's retrial, and Massie exonerated Vetter) it is likewise possible that Vetter would not have called Massie as a witness or that Massie, if called, would not have given exonerating testimony. Even had Massie been called and given such testimony he could have been impeached by his extrajudicial statements accusing Vetter of being the driver of the get-away car. In my opinion it is not reasonably proper that a result more favorable to Vetter would have been reached in the absence of the asserted errors, and I would affirm the judgments as to Vetter as well as to Massie."

It is hereby submitted that the above case is exemplary authority for the constitutional violation of the confrontation clause of the Sixth Amendment and its prejudicial result; trying Vetter with Massie, introducing into evidence Massie's implicating confession of Vetter (with agreement by the trial judge that he was going to consider the confession only against Massie) and Massie not taking the witness stand for cross-examination purposes was as surely a

violation of the Sixth Amendment's confrontation clause as if Massie would have taken the stand and the Court had refused cross-examination. The California Supreme Court recognized the inability of the trial judge to restrict his thinking.

In the recent case of James Brookhart, Petitioner, v. Martin A. Janis, Director of Ohio Department of Hygiene and Correction, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245, decided April 18, 1966, this Honorable Court reversed the conviction of petitioner Brookhart, citing with continuing approval Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065. At page 316 of 16 L. Ed. 2d 314, the Honorable Justice Hugo L. Black of this Honorable Court stated for eight members of the Court:

"In this court respondent admits that:

> "'If there was here a denial of cross examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'

"This concession is properly made. The Sixth Amendment provides that: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .' And in Pointer v. Texas, 380 U.S. 400, 406, 13 L ed 2d 923, 927, 85 S. Ct. 1065, we held that the confrontation guarantee of the Sixth

Amendment including the right of cross examination 'is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. Malloy v. Hogan, supra, 378 U.S., at 10 [12 L ed 2d at 661].' See also Douglas vs. Alabama, 380 U.S. 415, 13 L ed 2d 934, 85 S. Ct. 1074. It follows that unless petitioner did actually waive his right to be confronted with and to cross examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways.

"In the first place he was denied the right to cross examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his codefendants, Mitchell, who did not testify in Court, and petitioner was therefore denied any opportunity whatever to confront and cross examine the witness who made this very damaging statement."

It is apparent that this was a Judge Trial, as opposed to a Jury Trial. It is submitted therefore, that this Honorable Court was not predisposed to overlook this grave Constitutional error by the rationalization that it happened before a Judge, who could sift the error from

his thinking in arriving at a decision in the case. This grave lack of confrontation of the confession maker and codefendant who did not take the witness stand for confrontation and cross examination by petitioner Brookhart was a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." 16 L. Ed. 2d 314, 316-317, 384 U.S. 1, 86 S. Ct. 1245.

It is clear this Honorable Court did not even examine as to the application of a Federal Harmless Error Rule, as the violation was direct and clear and cut to the heart of the Sixth and Fourteenth Amendments.

It seems clear, and is hereby asserted by this petitioner that recognizing the inability of a trial judge to disregard the hearsay implicating confession of the codefendant as to defendant Brookhart by this Honorable Court, so much easier should it be to recognize the inability of a lay jury to truly disregard it, even under the command of jury instructions; that whether a judge or jury be the trier of fact, introducing an implicating confession by a codefendant without that codefendant taking the stand for cross-examination purposes is surely a violation of the Sixth Amendments confrontation clause; that said violation requires reversal of the resulting conviction without recourse to a "Harmless Error Rule", and that this Honorable Court in Jackson v. Denno (1964), 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A. L. R. 3d 1205, condemned the analogous practice of permitting the jury to hear the substance of a confession,

with instructions to disregard it if the jury found it to be involuntary.

This Honorable Court's attention is directed to the fact that in Jackson v. Denno, supra, the Honorable Chief Justice Warren, a sole-surviving member of this Honorable Court as now constituted among the five-man majority in Delli Paoli, joined the majority in Jackson v. Denno in citing with approval the dissenting opinion of the late Justice Felix Frankfurter in Delli Paoli:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they can not put out of their minds."

It is to be further recalled that among the four dissenters in Delli Paoli, only the late Justice Felix Frankfurter has departed; the Honorable Associate Justices Black, Douglas and Brennan remain with this Honorable Court.

Hearkening back to the considerations wrought by time and further social, scientific, and legal progress which this Court must have given to its decision in granting of certiorari to indigent Clarence Earl Gideon to reconsider Betts v. Brady (1942), 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252, resulting in Gideon v. Wainwright (1963), 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792; to a grant of Certiorari to reconsider Crooker v. California (1958), 357

U.S. 433, 2 L. Ed. 2d 1448, 78 S. Ct. 1287, resulting in Escobedo v. Illinois (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 and Miranda v. Arizona (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602; to the half-century it took to reconsider Plessy v. Ferguson (1896), 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138, in Brown v. Board of Education (1955), 349 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, this petitioner Glenn Martin Harrington herewith asserts by and through his counsel, Roger S. Hanson of Los Angeles, California, that without formally doing so, this Honorable Court has correctly eroded the 1957 authority of Delli Paoli v. United States (1957), 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 and said decision now lacks vitality.

While recognizing the non-formal reversal of Delli Paoli v. United States (1957), 352 U.S. 232, and its still apparent validity to those states who wish to invoke it, Associate Justice Mathew O. Tobriner of the Supreme Court of California, writing for the majority in People v. Massie and Vetter (1967), 66 Cal. 2d 899, 922 states:

> "If the practice of admitting the extrajudicial implicating confession of a codefendant with limiting instructions were held to be a violation of due process, or of the confrontation clause of the Sixth Amendment, we would, of course, be bound to apply an error test at least as strict as that announced in Chapman v. California (1967), 386 U.S.

18, 23 [17 L. Ed. 2d 705, 87 S. Ct. 824]: '[the prosecution must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'

"Commentators have pointed out that developments in constitutional law since 1957 provide every reason to believe that the decision announced by Justice Burton in Delli Paoli v. United States (1957) 352 U. S. 232 [1 L. Ed. 2d 278, 77 S. Ct. 294] (joined by Justices Reed, Harlan, and Clark, and Chief Justice Warren), approving the practice condemned by Aranda, no longer possesses vitality. They suggest that if confronted with the problem today, the court would hold that a procedure similar to that required by Aranda is compelled by the federal Constitution.

"First, in Jackson v. Denno (1964) 378 U. S. 368 [12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 A. L. R. 2d 1205], the Supreme Court condemned the analogous practice of permitting the jury to hear the substance of a confession, with instructions to disregard it if the jury found it to be involuntary. Chief Justice Warren, a member of the five-man majority in Delli Paoli, joined the majority in citing with approval the dissenting opinion of Justice Frankfurter in Delli Paoli: 'The Government should not have the windfall of having the jury be influenced

by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (Id. at 388 fn. 15.)

"Second, in Pointer v. Texas (1965) 380 U.S. 400 [13 L.Ed.2d 923, 85 S.Ct. 1065], and Douglas v. Alabama (1965) 380 U.S. 415 [13 L.Ed.2d 934, 85 S.Ct. 1074], the court held applicable to the states the Sixth Amendment's guarantee protecting an accused's right to confront the witnesses against him. In Douglas, the prosecutor was permitted to cross-examine an accomplice by reading his extrajudicial implicating confession, over the accomplice's refusal to answer incriminating questions; despite the trial court's instruction that the jury consider as evidence of guilt only the testimony of witnesses (380 U.S. 415, Transcript of Record, pp. 11-16, instructions 39, 42, 69, 71), the Supreme Court reversed the conviction, thereby implying necessarily that the instructions were insufficient to cure the prejudicial effect of the accomplice confession.

"Third, Spencer v. Texas (1967) 385 U.S. 554 [17 L.Ed.2d 606, 87 S.Ct. 648], when viewed together with Pointer and Douglas, provides additional support for the belief that the Delli Paoli procedure is unconstitutional. In Spencer, the court, through Justice Harlan, upheld the constitutionality of the Texas recidivist

statute, whereby the jury is informed of a defendant's prior convictions for sentencing purposes and instructed to ignore them in finding guilt or innocence. Although his opinion refers to Delli Paoli in discussing generally the permissibility of joint trials, Justice Harlan does not mention Delli Paoli's approval of admitting implicating confessions. Moreover, the opinion distinguishes Jackson v. Denno on the ground that 'the emphasis there was on protection of a specific constitutional right.' Since Pointer and Douglas identified the confrontation clause as the source of 'a specific constitutional right' applicable to the states, the Delli Paoli procedure should share the fate of the procedure condemned in Jackson v. Denno.

"In his dissent in Jackson v. Denno, Justice Harlan asked, 'But was there not greater danger in Delli Paoli that one defendant's confession of his and his codefendant's guilt would infect the jury's deliberations bearing on the guilt of the codefendants?' (378 U.S. at 434.) The similarity between the policies of insulating the jury from the confessions of a defendant before they are determined to be voluntary, and insulating the jury from the implicating portions of the confessions of codefendants was also recognized in The Supreme Court, 1963 Term (1964) 78 Harv. L. Rev. 143, 213:

'Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.'

"See also People v. Aranda, supra, 63 Cal. 2d 518, 529 fns. 7 and 8; People v. Clark (1965) 62 Cal. 2d 870, 885 fn. 13 [44 Cal. Rptr. 784, 402 P. 2d 856]."

In a sense it should be recognized that the prejudicial effect of Delli Paoli is more caustic than the prejudicial effect of Jackson v. Denno error. This is because in Jackson v. Denno, the confession, if ruled invalid by the jury was physically removed thereafter from the trial; only its lingering mental recall lurked to introduce error. Clearly in Delli Paoli error, the confession of the co-defendant, while under jury rules to be disregarded as to the non-confessing defendant, still physically remains intact as to the confessor. This means the jury may ask to have it replayed to refresh its mind on the evidence; in some states if it is transcribed to a typewritten form and signed and introduced into evidence, it may be carried into the jury deliberation room to read and re-read. In this respect, it makes recurring impact on the jury's minds and further vitiates the fiction that a jury can isolate its effect only to the confessor as required by the quickly-read and seldom truly understood jury instructions. The Delli Paoli error is therefore truly always a part of the entire case, and cannot be as theoretically

rectified as was the Jackson-Denno error.

In People v. Aranda (1965) 63 Cal. 2d 518, 529, the Chief Justice of California, the Honorable Roger J. Traynor has stated the problem lucidly:

> "Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however when the admissible confession of one defendant inculpates another defendant the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering innocence of the declarant and then of ignoring it in determining the guilt of innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes' (People v. Chambers, 231 Cal. App. 2d 23, 33, 41 Cal. Rptr. 551). It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

In People v. Massie and Vetter, 66 Cal. 2d 899, 923, Justice Tobriner of California's Supreme Court states:

> "In the present case, in view of the closely balanced state of the evidence, it is reasonably probable that Vetter would have received a more favorable verdict at a separate trial. First, we have recognized that even a judge would face a formidible task in attempting to exclude from his consciousness the certain knowledge that in his confession, inadmissible as to Vetter, Massie had named Vetter as the driver of his get-away car."

Thus, we see that the California Supreme Court has given careful consideration to this problem, and has declared emphatically that in either a judge or jury trial, it feels the requisite mental compartmentalization and segregation can not be attained.

Therefore, in the interests of justice and to insure uniform interpretation of the confrontation clause of the Sixth Amendment to the United States Constitution, now binding on the State Courts of California (Pointer v. Texas, 380 U.S. 400) this Honorable Court is respectfully petitioned to grant Certiorari in the instant case, Glenn Martin Harrington v. State of California; the major issue is the question of the constitutionality of Delli Paoli v. United States. The issue is, said another way, "Should this Court's holding in United States v. Delli Paoli,

352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 be reconsidered?"

This petitioner respectfully submits it should, for it is clearly a constitutional question of national import, evoking the thought-provoking processes of numerous legal scholars at both the trial and appellate levels throughout these United States, over the past decade.

II

THE SUPREME COURT OF THE UNITED STATES SHOULD DECLARE THAT THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE APPLYING THE CALIFORNIA "ARANDA RULE" AS DEVELOPED IN PEOPLE v. ARANDA (1965), 63 Cal. 2d 518 TO JOINT TRIALS OF CODEFENDANTS AND A REVIEW OF THAT AUTHORITY TO COMPARE IT TO DELLI PAOLI v. UNITED STATES, 352 U.S. 232 DEMANDS THE GRANTING OF THIS WRIT OF CERTIORARI.

As enunciated by the Honorable Roger J. Traynor, Chief Justice of California in People v. Aranda, 63 Cal. 2d 518, at 529, 530 and 531, that rule is:

"The grave constitutional doubts

engendered by our present practice of permitting joint trials when the confession of one defendant implicates codefendants has prompted our reconsideration of this practice. Whether or not it is constitutionally permissible, the practice is prejudicial and unfair to the nondeclarant defendant and must be altered. . . . In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098 (Cal. Penal Code).

"When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant the trial court must adopt one of the following procedures:

(1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established.

(2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions can not be made.

(3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible."

It is submitted that grave constitutional questions need reviewing by this Honorable Court in a hearing granted for this sole purpose; the resulting decision should clarify this major problem on the national level, either requiring those states which do not conform to Aranda standards to do so, or further distinguishing the mandates of Pointer v. Texas, Douglas v. Alabama, Brookhart v. Janis and Jackson v. Denno from Delli Paoli v. United States. And, as well, this Court should elucidate the fact that this problem and the resulting error constitute constitutional error of the first magnitude, which can not be saved by a harmless error rule; automatic reversal is required.

III

THE CALIFORNIA COURT OF APPEALS ERRED IN APPLYING ANY HARMLESS ERROR RULE TO THIS VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, FOR IT WAS A CONSTITUTIONAL ERROR OF THE FIRST MAGNITUDE AND NO AMOUNT OF SHOWING OF WANT OF PREJUDICE WOULD CURE IT.

It is clear that there are errors committed at the trial level such as the introduction into evidence of a coerced confession which automatically require reversal no matter what other supporting evidence is available.

It is further true that violations of federally protected rights require application of the federal harmless error rule. In this regard we have the comment on the failure of the defendant to take the witness stand by a prosecutor, as noted in Griffin v. California, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, and as enunciated in Chapman and Teale v. California (1967), 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824, overruling application of the California State harmless error rule to the Griffin v. California type of error.

Lastly, if the error is one of state law or practice, the states may themselves apply their

own harmless error rule.

As noted in the Appendix A in the opinion of the California Court of Appeals, the State harmless error rule was here applied 256 A. C. A. 555, 560. See also California Constitution, Article VI, Sec. 13; People v. Watson (1956), 46 Cal. 2d 818, 836, 299 P. 2d 243.

As noted previously in this petition, Brookhart v. Janis (1966), 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 per the Honorable Justice Hugo Black, makes "a denial of cross examination without waiver a constitutional error of the first magnitude and no amount of showing of want to prejudice would cure it."

It is therefore submitted that Jackson v. Denno requires this Court to reconsider Delli Paoli v. United States, and arrive at the conclusion that the confessing defendant's statements are truly being applied to the party being incriminated. If this is so, and that confessing defendant has not taken the witness stand for cross-examination by the implicated defendant, the Sixth Amendment has been violated, and a reversal of the conviction is required by Brookhart v. Janis regardless of the availability of valid other convicting evidence.

It is therefore evident that the Court of Appeals erred in applying a state harmless error rule to "a constitutional error of the first magnitude [where] no amount of showing of want of prejudice would cure it." 16 L. Ed. 2d 314, 316, 317.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING PETITIONER'S TIMELY MOTION FOR A SEPARATE TRIAL, AND THE COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION REGARDLESS OF THIS ERROR.

In People v. Clark, 62 Cal.2d 870, 885, the Honorable Raymond E. Peters, Associate Justice of the California Supreme Court states:

> "Some authorities in this field feel that a denial of a motion to sever amounts to a denial of due process whenever joint trial will require a jury to determine both the voluntary nature and truth of an extrajudicial statement which incriminates both the maker and his codefendant. The reasoning is that the jury, even though instructed that an extrajudicial statement is not to be considered against any defendant save he who made it, cannot put out of mind its determination of the truth of that statement in all of its details. Hence, it unconsciously accepts the truth of the hearsay.
>
> "In Jackson v. Denno, 378 U.S. 368 [84 S.Ct. 1774, 12 L.Ed.2d 908],

the United States Supreme Court held that a jury is ordinarily incapable of separating the issue of voluntariness of an extrajudicial statement from the issue of its truth, and that due process requires that the trial judge determine the first issue. If defendants are to be tried under circumstances wherein their several extrajudicial statements incriminate the others, even more is required of the jury than under the situation involved in Jackson. In such case, the jury is expected to forget that it found the statement containing the hearsay incrimination to be true. As said in People v. Chambers, 231 Cal. App. 2d 23, 33 [41 Cal. Rptr. 551] 'Thoughtful judicial opinions have voiced misgivings as to jurors' ability to segregate evidence into separate intellectual boxes, each containing a single defendant. (People v. Biehler, supra, 198 Cal. App. 2d at p. 298 [17 Cal. Rptr. 862]; see also United States v. Haupt, 136 F. 2d 661, 673-674.) Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged. . . . [J]udicial cliches carving jurors' minds into autonomous segments may waver and fail.'

"In Jackson, supra, the court quoted with approval from Morgan, Some Problems of Proof under the Anglo-American System of Litigation

(1956) pages 104-105, where the author says, referring to the issue of voluntariness, ' "regardless of the pious fictions indulged by the courts, it is useless to contend that a juror who has heard the confession can be uninfluenced by his opinion as to the truth or falsity of it. . . . [T]he rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed." ' If this be so, how can that juror be uninfluenced by that portion of the confession which incriminates a codefendant? If he finds the confession to be true, does he find it true only in those matters wherein the codefendant plays no part? Can he find that the confession is true insofar as it admits that A committed certain acts in concert with B, and not at the same time believe that B committed those same acts in concert with A? By finding the confession to be true, has he not convicted the codefendant without benefit of other evidence? The incongruity of any rule which assumes that this dilemma may be cured by instructions is discussed in a comment in 78 Harvard Law Review 211, at page 213. It has been argued that a proper rule would either (1) require severance of trials when such extrajudicial statements are to be used, (2) make such statements inadmissible when the prosecution insists on joint

trial, or (3) allow joint trial and use of extrajudicial statements only after the trial judge has deleted therefrom all reference to any codefendant."

In that same opinion, Justice Peters quotes approvingly People v. Chambers, 231 Cal. App. 2d 23, 33:

> "Thoughtful judicial opinions have voiced misgivings as to jurors ability to segregate evidence into separate intellectual boxes, each containing a single defendant. Unconscious motivations . . . slip into the processes of conscious mentation unseen, unfelt and usually unacknowledged . . . . Judicial cliches carving jurors' minds into autonomous segments may waiver and fail."

Here the petitioner timely voiced his motion for a separate trial to avoid the Delli Paoli error; this motion was denied, and it is error of the first magnitude, requiring granting of the Writ of Certiorari to review again the Delli Paoli rule.

For the reasons hereinabove stated, petitioner Glenn Martin Harrington respectfully prays that the Writ of Certiorari issue to the State of California Court of Appeals, Second District, Division Two to review the judgment of that Court and to reconsider the current validity of Delli Paoli v. United States, 352 U.S. 232.

Respectfully submitted,

ROGER S. HANSON, Ph.D., J.D.
Member of the Bar
Supreme Courts of California, Michigan, Illinois and Iowa

Attorney for Petitioner,
Glenn M. Harrington

APPENDIX "A"

OPINION OF CALIFORNIA COURT OF APPEALS SECOND DISTRICT, DIVISION TWO 256 A.C.A. 555

APPEALS from judgments of the Superior Court of Los Angeles County. Joseph A. Wapner, Judge. Affirmed.

Prosecutions for murder. Judgments of conviction of first degree murder affirmed.

Patrick J. Sampson, under appointment by the Court of Appeal, and William V. Shannon, Jr., under appointment by the Court of Appeal, for Defendants and Appellants.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and James H. Kline, Deputy Attorney General, for Plaintiff and Respondent.

HERNDON, J. - Each of the defendants Bosby, Cooper, Harrington and Rhone has appealed from the judgment entered upon the verdict of a jury finding him guilt of murder in the first degree. [1] The jury fixed each

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1 At the time of oral argument, this court was advised by counsel that appellant Cooper had died on May 21, 1967, during the pendency of this appeal. Thereafter, respondent's motion to

(Continued)

appellant's sentence at life imprisonment.

Appellants contend (1) that their extrajudicial statements were obtained without compliance with the rules enunciated in Miranda v. Arizona, 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]; (2) that their extrajudicial statements were not edited to prevent "cross-incrimination" as required by the retroactively applicable standards established in People v. Aranda, 63 Cal.2d 518 [47 Cal.Rptr. 353, 407 P.2d 265]; and (3) that the court erred in instructing on premeditated murder when, absent the application of the felony-murder doctrine the evidence was insufficient to sustain a verdict of first degree murder. We find no merit in these contentions.

The evidence is without material conflict. Defendants Bosby, Cooper and Harrington offered no defense, neither testifying themselves nor calling any witnesses to testify in their behalf. Defendant Rhone did take the stand but his version of the events in issue did not differ in any substantial way from that presented by the prosecution.

In summary, the evidence in support of the judgment establishes that appellants were seen to transfer from one car to another a short distance from the combination liquor and grocery

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1 (Continued) abate appellant Cooper's appeal, supported by a certified copy of the certificate of his death, was granted.

store owned and operated by Mrs. Robbins and her brother, Darrell Ashcraft. The time was approximately 2 p. m. on Friday, December 11, 1964, when Mrs. Robbins would have a large amount of cash on hand to enable her to cash the pay checks of the employees of the several businesses located near her store.

Appellants Cooper and Bosby entered the store at or about the same time. Cooper asked Mrs. Robbins if she would cash a pay roll check. She indicated that she would but would have to examine it first. Cooper, after reaching into his pocket, stated that he must have left his check in his car and went outside to get it. In the interim, Bosby engaged Mr. Ashcraft in conversation regarding a particular size bottle of wine. When Cooper returned he was accompanied by Harrington and Rhone who took positions within the front of the store. Mrs. Robbins remembered seeing them a few moments earlier outside her store recalling in particular Harrington's bright red hair. [2]

Although Mrs. Robbins testified that the check presented to her by Cooper and the accompanying identification appeared to be in order, she intuitively felt something was amiss. As she expressed it: "Yes, he [Cooper] handed it to me and I looked at it and I knew it was a good

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2 Apparently Rhone, Cooper and Bosby were readily identified as Negroes while Harrington was originally described as either white or a very light-skinned Negro.

check. I had cashed this company's checks before, but, I don't know, there was something about the way Mr. Rhone looked or something, I knew I wasn't going to open that box." By "box" she referred to a "check cashing register" in which the large sums of money were kept in addition to the regular amounts within the "main cash register."

At this point Mrs. Robbins heard and observed what appeared to her to be a "collision" between Bosby, who was in the rear of the store, and an elderly employee, Ben Serna. She testified that both men fell and when they arose she saw Mr. Serna moving towards her in a jerking fashion as if being prodded by Bosby whom she heard say, "Man, I told you not to give me any trouble."

While Mrs. Robbins' attention was diverted in the direction of Bosby and Mr. Serna, her brother, who could not see them from his position nearer the front of the store, observed Cooper and Harrington each draw a gun. Harrington told him to "Hold it." Mrs. Robbins testified that she continued to watch Bosby and Mr. Serna as they approached her, and observed that Bosby had a gun pressed against Mr. Serna's body. Mrs. Robbins then reached for her own gun which was kept in a drawer beneath the cash register but as she drew it out Rhone moved forward and seized her wrist and either he or Cooper removed the gun from her hand.

Mr. Ashcraft also saw his sister disarmed, and when he was told to move to the rear of the

store, he complied and tried to push his sister on ahead of him. At this point a shot was heard and while Mr. Ashcraft could not see who fired the shot, Mrs. Robbins testified that she saw Bosby shoot Mr. Serna at point-blank range. Serna took a few steps forward with blood running from his mouth and shirt front and then fell dead upon the floor. Both Mrs. Robbins and Mr. Ashcraft complied with the orders to move to the rear of the store but in the confusion of their exit the electric cord that supplied power to the register was pulled from its socket which prevented it from being opened. They exited through the rear of the store and when they returned appellants had departed.

Other witnesses saw appellants run to the car in which they had arrived and drive rapidly away, running a red light in the process. They were next seen moments thereafter then they again switched cars at the spot nearby where their second car waited with another man behind the wheel and the motor running.

The license number of the car used to leave the store was obtained by witnesses who had observed appellants' flight. Although appellant Cooper later asserted that the car "belonged" to him, it was registered to a third person in another part of Los Angeles. Subsequently, each of the appellants was arrested and each gave statements after being fully advised of their constitutional rights in accordance with the rules enunciated in People v. Dorado, 62 Cal. 2d 338 [42 Cal. Rptr. 169, 398 P. 2d 361].

The statements of Cooper, Bosby and Rhone were tantamount to confessions that they were attempting to rob the store when the shooting occurred but each denied committing the murder itself. Each statement involved all four defendants. Harrington admitted only that he had driven to the market with three Negroes but originally had remained in the car until he decided to follow them in order to purchase cigarettes. He admitted fleeing with "Jesse and Rhone" and spending the night with them in a motel in Pasadena where he dyed his hair from red to black and shaved off his moustache.

[1] Appellants' initial assignment of error, of course, was based upon the hope that California would choose to apply the additional requirements of Miranda v. Arizona, supra, 384 U.S. 436, retroactively as People v. Dorado, supra, 62 Cal. 2d 338, had applied the ruling in Escobedo v. Illinois, 378 U.S. 478 [12 L.Ed. 2d 977, 84 S.Ct. 1758]. Unfortunately for appellants, but fortunately for society, our Supreme Court declined the option permitted by Johnson v. New Jersey, 384 U.S. 719 [16 L.Ed. 2d 882, 86 S.Ct. 1772], and restricted the application of Miranda to cases tried after June 13, 1966. (People v. Rollins, 65 Cal. 2d 681, 683 [56 Cal. Rptr. 293, 423 P. 2d 221].)

[2] Nevertheless, although the statements of each appellant were properly admissible in evidence against such appellant, they are correct in their contention that the trial court did not anticipate and conform to the new rules regulating the use of extrajudicial statements

subsequently promulgated in People v. Aranda, supra, 63 Cal. 2d 518, 530-531. The partial retroactivity of these rules was established in People v. Charles, [a]66 Cal. 2d ___, ___ - ___ [57 Cal. Rptr. 745, 425 P. 2d 545]. This error, however, does not require automatic reversal. In People v. Lara, [b]67 Cal. 2d ___, ___ - ___ [62 Cal. Rptr. 586, 432 P. 2d 202], the Supreme Court most recently expressed itself in the following manner:

"The confession of each defendant implicated the other. On its face, this record shows a violation of the rules of practice declared in People v. Aranda (1965) supra, 63 Cal. 2d 518, 528-531, which require the trial court to determine whether those parts of a confession implicating a codefendant can be effectively deleted without prejudice to the declarant; and if they cannot, to sever the trials or exclude the confession. It must be acknowledged that the present trial took place before Aranda was decided, and fully complied with the requirement of limiting instructions under the prior law. However, since the Aranda rules govern in all cases still pending on direct review (People v. Charles (1967) [c]66 Cal. 2d ___ [57 Cal. Rptr. 745, 425

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[a]Advance Report Citation: 66 A. C. 325, 330-332.

[b]Advance Report Citation: 67 A. C. 367, 395-396.

[c]Advance Report Citation: 66 A. C. 325.

P. 2d 545]), the admission into evidence of certain of defendants' unedited confessions constituted error. But Aranda makes it clear (63 Cal. 2d at p. 527) that the error is reversible only if it causes prejudice. Here, as in Charles, each defendant's case was shattered in any event by the impact of his own detailed confession, and the fact that each was also implicated by his codefendant's confession cannot realistically have contributed to either conviction. In these circumstances, we are of the opinion that it is not reasonably probable that a result more favorable to defendants would have been reached had the Aranda rules been followed (Cal. Const., art. VI, §13; People v. Watson (1956) 46 Cal. 2d 818, 836 [299 P. 2d 243].)

"We do not mean to imply that a violation of the Aranda rules will be automatically nonprejudicial as to any defendant who has made a confession of his own. In every such case the issue remains whether the effect of any circumstances which might otherwise have mitigated the impact of the defendant's confession was overcome by the portions of a codefendant's statement implicating the defendant; in that event, the implication would be prejudicial despite the defendant's own confession. Such a situation might occur, for example, when the confessing defendant presented evidence to show his statement was not freely given, and also denied its truth on the witness stand. In the case before us, however, Lara made no such denial; on the contrary, he admitted he told the police the whole story of what had happened on the night of the killing." (See also our recent

extended analysis of this aspect of Aranda in People v. Wattie, [d]253 Cal. App. 2d ___, ___ - ___ [61 Cal. Rptr. 147].)

As we have previously indicated, the evidence against each appellant, apart from his own extrajudicial statement and those of his codefendants, was exceedingly strong. Their identity as the parties involved in the events within the market is not disputed. Their switching of cars before and after their entry upon the premises had been established. Three of the party had drawn guns and were directing the victims to the rear of the store when the fatal shot was fired. Cooper had cashed checks in the market previously and the inference is virtually inescapable that the four appellants, acting in concert, had entered the market at that particular time and on that particular day of the week with the intention of forcefully stealing the large amounts of cash which then would be present on the premises. They were engaged in the attempts so to do when the killing occurred.

None of the appellants either "presented evidence to show his statement was not freely given, [or] denied its truth on the witness stand." (People v. Lara, supra, [e]67 Cal. 2d at p. ___.) Rhone, the only appellant to testify in his own behalf, expressly conceded the free and voluntary

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[d]Advance Report Citation: 325 A. C. A. 459, 468-470.

[e]Advance Report Citation: 67 A. C. at p. 396.

nature of his extrajudicial statement and the overall accuracy and truthfulness of its contents. That is to say, Rhone testified that he and his codefendants had discussed the robbery in advance and the part each person was to play therein. They had definitely agreed that the robbery would occur on a Friday when the greatest amount of money would be obtainable. He corroborated each of the events described by the prosecution's witnesses. Further, he confirmed the fact that a futile attempt had been made to open the cash register after the shooting.

The sole defensive thrust of Rhone's testimony was his contention that although he had agreed to commit the robbery if the conditions in the market were favorable and as described to him by Cooper and Bosby, nevertheless when the conflict between Bosby and Mr. Serna had occurred, he had not as yet reached a decision and therefore his participation did not amount to an attempt to rob. For example, on direct examination the following questions and answers are reported: "Q. Then, is it your statement that although you went into the store to pull a robbery, you didn't have one? A. Well, no, not exactly. We went into the store to look at it. You see, I hadn't even seen it yet. Q. I see. That is, you wanted to case the place? A. Right."

Under cross-examination concerning his earlier statement to the police, Rhone further clarified the limited nature of his later version of the situation, and then, in effect, destroyed

any semblance of merit it might otherwise have presented: "Q. Then Officer Vaughn asked you, 'Did you and the previous persons I have just mentioned get together some place Friday and discuss or have a conversation pertaining to possibly robbing this market?' and you said, 'Yes, sir.' A. Yes, sir. Q. And he asked you, 'Approximately what time was that? And you said, 'About noon'? A. Yes, sir. Q. He asked you, 'Where was that?' And you said, 'In Compton'? A. Right. Q. He asked you, 'At your sister's house?' And you said, 'Yes'? . . . A. Yes, sir. Q. And then the officer asked you, 'Whose idea was this to rob the market?' And you said, 'It was Jesse's? A. Yes, sir. Q. He asked you, 'Did Jesse lay out the plans?' You said, 'Yeah.' 'To knock over the market?' And you said, 'Yeah'? A. Yes. Q. Then he asked you, 'Was Jesse Bosby or Gilbert Cooper to go in the market first or this white fellow known as Glen Harrington'? A. Yes, sir. Q. And you said, 'To try and cash a check'? A. Yes, sir. Q. Is that right? A. Right. Q. Was that the agreement? A. That's the way it was supposed to go, yes, sir. . . . Q. Is that the way you were going to do it that day? A. It wasn't decided whether we'd do it that day or not. . . . Q. Isn't that what happened that day? A. Thats what happened, yes, sir." (Italics added.)

We therefore, dispose of this aspect of the appeals of Rhone, Bosby and Cooper in the following apposite paraphrase of the holding in People v. Charles, supra, [f] 66 Cal. 2d ___,

[f] Advance Report Citation: 66 A. C. 325, 333-334.

___ - ___ : "Turning first to the basic Aranda violation, we consider crucial the fact that each defendant's case was completely shattered by his own detailed confession, corroborated by the eyewitness testimony of [the independent witnesses and] the robbery victim[s]. In this setting, the fact that each defendant was also implicated by his codefendant[s] confession cannot realistically have contributed to [his own] conviction. . . . [W]e find no reasonable probability in this case that [the] jury would have returned a more favorable verdict for [appellants] if, as required by Aranda, the defendants had been tried separately or each confession had been 'edited' to include no references damaging to the nondeclarant[s]." [3]

Although it is true that appellant Harrington did not make a confession, nevertheless he did

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3 In this regard it is rather ironic to note that with remarkable prescience and with the careful attention he gave to appellants' rights throughout the trial the trial court in the instant case initially actually had required the statements to be edited prior to being presented to the jury. For his pains he was accused by one defense counsel of increasing the prejudicial effect of the statements because it was then impossible for the jury to hear which party had done what and therefore they might conclude that his client had done more than he actually had. The court therefore reversed itself and permitted the statements to be introduced as given in order to be fair to appellants!

admit that he was the red-haired man who had entered the store with his three Negro companions; that he had fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. Inasmuch as the victims of the robbery had testified that Harrington had drawn a gun, ordered Ashcraft to "Hold it," and that they were moving to the rear of the establishment as directed when Mr. Serna was killed, it is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in an attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof.

[3] Appellants' final contention based upon alleged error in instructing the jury is unmeritorious for two reasons. First, it was perfectly and unmistakably clear from the moment that the prosecution made its opening statement to the jury, until it closed its final argument, that the instant case was being tried upon the theory of the felony-murder doctrine. No indication was ever given at any time that the prosecution was contending that Mr. Serna's death had been specifically deliberated and premeditated in the ordinary usage of these terms. In addition, the court did not give any instruction concerning premeditation in first degree murder. (Cf. CALJIC 303.) The sole basis for appellants' argument on this issue arises from the apparently inadvertent failure of the trial court to completely strike that portion of CALJIC 302-A [4]

[4] CALJIC 302-A is a verbatim quote of Penal Code, section 189.

that refers to premeditated killings. As given, the instruction was only partially deleted as follows: "All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 of the Penal Code, is murder of the first degree, and all other kinds of murder are of the second degree."

Inasmuch as the court did not instruct on premeditation but did give complete instructions on murder in the commission of certain felonies (CALJIC 302-F), murder of the second degree (CALJIC 305), and voluntary manslaughter (CALJIC 308-A, 310, 311, 311-A, 305-AA), we conclude that the jury was not confused as to the issues submitted for their determination. As presented to them by the prosecution, each defense counsel and by the court, the degree of the murder was to be determined solely upon the basis of the felony-murder doctrine.

However, in disposing of this assignment of error on this basis, we do not imply that appellants are correct in their basic contention that the evidence would be insufficient to warrant giving an instruction on premeditated murder quite apart from the felony-murder doctrine. As observed by the Supreme Court in People v. Washington, 62 Cal. 2d 777, 781-782 [44 Cal. Rptr. 442, 402 P. 2d 130]:

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[4] "A defendant need not do the killing

himself, however, to be guilty of murder. He may be vicariously responsible under the rules defining principals and criminal conspiracies. All persons aiding and abetting the commission of a robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design. [Citations.] Moreover, when the defendant intends to kill or intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective. [Citations.]

"Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, 'the defendant for a base, anti-social motive, and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death' [citation], and it is unnecessary to imply malice by invoking the felony-murder doctrine. To invoke the felony-murder doctrine to imply malice in such a case is unnecessary and overlooks the principles of criminal liability that should govern the responsibility of one person for a killing committed by another. [Citations.]"

When four men arm themselves with deadly weapons and enter a public market for the purpose of robbing it, or even "to case it" as appellant Rhone asserted, it seems clear that " 'for a base, antisocial motive and with wanton disregard for human life, [they commit] an act that involves a high degree of probability that it will result in death.' " (People v. Washington,

supra, 62 Cal. 2d at p. 762.)

The judgments are affirmed.

Roth, P. J., and Fleming, J., concurred.